

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

GARY WAYNE BAGNALL, ET AL.

Serial No.: 10/759,585

Filed: January 15, 2004

For: LIVE INSECT TRAP

Group Art Unit: 3643

Examiner: Rowan, Kurt C.

Conf. No.: 7985

REPLY BRIEF
ON APPEAL TO THE BOARD OF PATENT APPEALS AND INTERFERENCES

Mail Stop Appeal Brief - Patent
Commissioner for Patents
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This Reply Brief is submitted in response to the Examiner's Answer, which was mailed on November 30, 2006.

In the Answer, the Examiner makes certain arguments in response to the points raised in the Appeal Brief. Those arguments are addressed in the order in which they were made by the Examiner.

First, the Examiner argues that Appellants "[have] not set an objective standard for what is a reflective surface and [therefore] the Examiner is entitled to use the broadest reasonable interpretation standard as to the [metes] and bounds of the claim." However, such a standard does in fact exist. As pointed out at page 2 lines 13-17 of the Specification (which is referenced on page 3 of the Appeal Brief), the inner surface of

the presently claimed upper section preferably is sufficiently reflective to cause trapped insects to become disoriented. In contrast, the applied-art reference Beaton does not disclose anything about an upper section, as recited, with side walls having an inner surface that is reflective, much less anything about any level of reflection that would cause insects to become disoriented. As noted in the Appeal Brief, the Examiner is attempting to read the subject limitation entirely out of the claim by arguing that any surface necessarily must reflect some *de minimis* amount of light.

It is also noted that, contrary to the Examiner's argument, the Examiner is not entitled to give a claim term its broadest reasonable interpretation, but instead is required to give a claim term its broadest reasonable construction *in light of the specification as it would be interpreted by one of ordinary skill in the art*. See, e.g.,

Phillips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005):

"The Patent and Trademark Office ("PTO") determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction "in light of the specification as it would be interpreted by one of ordinary skill in the art." In re Am. Acad. of Sci. Tech. Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004)."

Nothing in the present Specification indicates that the term "reflective" is intended to mean a *de minimis* amount of reflection, such that any surface would be deemed reflective. Just the opposite, the Specification sets forth a specific purpose for the reflective nature of the surface, i.e., to disorient trapped insects.

Still further, dependent claims 22 and 23 recite this feature as their sole additional limitation. Accepting the Examiner's argument would make such claims entirely meaningless.

Accordingly, the Examiner's claim construction clearly is unreasonable in view of the Specification, and therefore should not be sustained.

Second, the Examiner addresses one of the many points raised by Appellants with respect to the Examiner's earlier assertion that it would have been obvious to move Beaton's disc 27 from the top of Beaton's upper section to the top of its lower section. Specifically, the Examiner argues that cover 27 would be just as effective a cover as Beaton's funnel.

However, this cannot possibly be the case, as cover 27 would then provide just a single thin hole which an insect could pass through in order to reach the outside world. On the other hand, with Beaton's entire structure in place, an insect would need to travel up through the entire length of Beaton's funnel, into Beaton's upper section and then out through one of the small slots 22 in that upper section to reach the outside world. Accordingly, the Examiner's argument clearly cannot be correct. Moreover, the Examiner has not even attempted to dispute any of the other points raised by Appellants with respect to this rejection.

Third, the Examiner argues that "different insects are attracted to different wavelengths of light," and therefore it would have been obvious to replace Beaton's light source with an ultraviolet light. However, the Examiner has not pointed to anything in the applied art indicating what kinds of insects are attracted to ultraviolet light as compared with other types of light or that the types of insects attracted to ultraviolet light would have been suitable for capture using a device such as is disclosed in Beaton.

Fourth, the Examiner asserts that "since insects are attracted to contrast between light and dark, one of ordinary skill in the art would have found it obvious to employ dark and light areas of the trap." It is not precisely clear as to which claims this argument refers. However, the Examiner has not pointed to anything in the applied art

to support such an argument or to indicate how one of ordinary skill in the art would have used such information to modify Beaton's device.

Fifth, apparently with respect to claim 20, the Examiner points to In re Jones, 162 U.S.P.Q. 224 (C.C.P.A. 1969) to support an argument that one of ordinary skill in the art would have been motivated to experiment with the size of Beaton's openings 22. However, that case is significantly different than the present one. In Jones, the generic material (asbestos) was disclosed in the prior art and the record indicated that there were only six possible species. In such a context, the United States Court of Customs and Patent Appeals concluded that one of ordinary skill in the art would have selected the preferred species (which was then being claimed) through routine experimentation. In the present case, Beaton shows a particular configuration for its device, and there is nothing to suggest that any experimentation or modification with respect to this particular aspect of that configuration would have been helpful or desirable.

Sixth, the Examiner argues that Figures 1 and 2 of Flynn show that elements 30 and 32 are "funnel portions" which are "different elements having different profiles or slopes." The Examiner then concludes, "Inherently funnel insert 30 is removable from funnel 32." However, absolutely nothing in Figure 1 or Figure 2 of Flynn indicates that portion 30 is removable from portion 32 or that such funnel portions are separable. To the contrary, as referenced in the Appeal Brief, column 3 lines 33-38 of Flynn expressly states that such different portions are "united together". In fact, if such portions of Flynn's funnel were not joined together, portion 30 likely would fall through the opening in portion 32 in the orientation depicted in Flynn's Figure 1.

Finally, in addition to Appellants' points refuted in the Examiner's Answer, which arguments are addressed above, the Appeal Brief raises many additional points which the Examiner does not even attempt to refute. Accordingly, those points are believed to have been acknowledged by the Examiner. On that basis alone, many if not all of the Examiner's rejections should be reversed.

In view of the foregoing remarks, Appellants respectfully request that the rejection of claims 1-16 and 18-23 be reversed and a Notice of Allowance issued.

Respectfully submitted,

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